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No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1980

LEODA WREN, et al.,

Petitioners,

vs.

NOLAN JONES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a case charging that respondent state officials discharged civil servants in violation of the First and Fourteenth Amendments:

(a) May petitioners' right to belong to a political party, *simpliciter,* be restricted by "balancing" other State interests against it?

(b) Have the plaintiffs (petitioners here) proved a *prima facie* case if they show that their constitutionally protected activity was a motivating factor in their discharge, or must they show that activity was the *sole* motivating factor?

(c) Can an appellate court substitute its own opinion for a District Judge's specific findings of fact as to motive and intent to violate constitutional rights and as to other issues, based upon inferences drawn from complex and conflicting testimony and circumstantial evidence?

2. Were petitioners denied their rights under the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment when respondents not only terminated their State employment but also precluded them from regaining it because they were Republicans?

3. Were petitioners denied procedural due process when they were denied any form of administrative or judicial hearing before or after being permanently laid off or discharged from their civil service positions?

4. Did the District Court abuse its discretion by assessing against the prevailing party half of petitioners' reasonable attorneys' fees on the condition that the findings of individual liability be sustained on appeal?

5. Should the judgment orders of the District Court (Appendices C through H) be corrected to allow (a) compensation for petitioners' overtime and (b) the 50% of their attorney's fees under 42 U.S.C. § 1988 which those orders deny?

6. As corrected, should those orders be reinstated?

LIST OF PARTIES

RESPONDENTS:

Illinois Department of Transportation
Former Secretary Langhorne Bond
Present Secretary John Kramer
Former Assistant to Bond, J. Brian Hannigan
District 9 Assistant District Engineer, Richard Miley
District 9 Business Manager, Donald Shelton

Illinois Department of Personnel
Former Director Nolan B. Jones
Present Director William R. Boys
Chief Field Officer, Robert Rhoads
Manager, Classification Division, David Knox Assistant to Director, Berwyn Hanley

Illinois Department of Mental Health
Former Director Leroy P. Levitt
Present Director Robert de Vito
Former Assistant to Levitt, Alfred P. Ronan

PETITIONERS:

Leoda Wren, Edward F. Atkins, Claris D. Barger, Lacie Dean Betts, James Paul Caldwell, Carl Dixon, Luster Etheridge, Arnold John Kommer, Rollie Linder, Robert Gale Lovellette, Theodore Jewell Patterson, Richard Dwight Peeler, Paul Potter, Forest Ray Simmons, Jewell Elbert Sisk, *Lillie Mathis, Velma Jenkins,* William Roosevelt Brooks, Charles Leroy Cochran, Ira Walter Harper, James Edward Johnson, Arthur William Meinders, William Allan Peeler, Charles Anthony Wenzel, *Verla Casey,* and Lowell Ray Holmes

(The italicized names are the widows of four original plaintiffs who died since this action was filed in 1973. They were substituted for their deceased husbands by orders of the District Court. Petitioner Barger is a former employee of the Department of Mental Health. Therefore, although the petition frequently refers to petitioners as "26 highway workers," this is not literally true.)

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PETITION FOR CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on December 10, 1980. (App. 21)

OPINIONS BELOW

The opinion of the Court of Appeals is Appendix A. It is reported at 635 F.2d 1277 (7th Cir. 1981). The opinion of the District Court is Appendix B. It is reported at 457 F.Supp. 234 (S.D.Ill. 1978).

JURISDICTION

The opinion of the Court of Appeals is dated December 10, 1981. That court denied rehearing on March 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution: Amendment One:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution: Amendment Fourteen:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. §1988 (Supp. 1976):

> • • • • In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevaiilng party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF FACTS

Citations to "CA" are to the pages of the voluminous cross-appendix filed by petitioners in the Court of Appeals. This document is not presently before this Court.

Petitioners are 26 highway workers formerly employed as civil servants by the State of Illinois. (This simplifies the more precise description which appears in the footnote at page 3, *supra*.) Respondents are present or former executives of the State. Petitioners brought this action under 42 U.S.C. §1983, invoking the District Court's jurisdiction under 28 U.S.C. §1343. Petitioners sought reinstatement and damages.

After 15 days of trial, some 300 exhibits, and testimony from 25 witnesses, the District Court held that respondents violated petitioners' First Amendment rights by

depriving them of their state jobs and their opportunities for job-saving transfers and reinstatements because they were Republicans. (App. 31-38) The Court awarded reinstatement, $393,000 in damages, and 50% of their attorneys' fees. (App. 5-6 and App. E-G) The Court of Appeals reversed, assuming some infringement of petitioners' constitutional rights (App. 17) but holding that (a) petitioners had failed to prove that "*the* motivation" for respondents' action was that infringement, (b) petitioners had failed to pass the *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) "balancing test," and (c) the District Judge's findings as to respondents' wrongful motive and intent, petitioners' injury, and respondents' defense were all "clearly erroneous." (App. 16-17, emphasis supplied.)

Petitioners proved that each successive Illinois administration since 1968, "has attempted to remove the patronage employees inherited from the former administration, place its own patronage people in those positions, and then to extend civil service coverage to its own new employees." (App. 3) The sequence was (App. 25-26): *First.* In 1968, the incumbent Democratic Governor got beat. His lame duck administration immediately ordered that its patronage workers in the Department of Transportation ("DOT") be included under civil service. *Second.* In 1969, the Republicans came in, revoked the civil service order, and replaced Democrats with Republicans. Then the Republicans placed all their people under civil service, while getting beat in the 1972 election. *Third.* In 1973 the new Democratic administration continued to operate a patronage system in DOT, notwithstanding the

continuing Republican civil service order. That patronage system was operating at DOT in June 1973 when petitioners were laid off, as respondent Rhoads admitted. (CA 70) Several months later, the Governor's Personnel Director, who is the lead respondent here, attempted to revoke the civil service order but was stopped by the State Civil Service Commission. (App. 3, 25)

In early 1973, some 27 previously laid off Democrats obtained a writ (the *"Bradley"* writ) from a State judge compelling DOT either to reinstate or to discharge them. (App. 24-26)

Petitioners here are the Republicans who had replaced the *Bradley* Democrats in 1969.* (For reasons lost in the antediluvian mists of Illinois political history, this process is known as "vicing.") In 1973, when the *Bradley* writ issued, petitioners were still protected by the civil service order of the departed Republican administration. (CA 6A, 255, 373, 387)

When the *Bradley* writ issued, respondent Hannigan who "was in charge of patronage at DOT" (App. 34) conferred with officials of the department. They decided to vice the same Republicans who had viced the *Bradley* Democrats four years before, rather than picking layoff candidates according to length of service or efficiency ratings. (App. 25-27)

The District Judge decided on the basis of a mass of testimony and circumstantial evidence that in vicing petitioners, *and denying them job-saving transfers and subsequent reinstatements to fill vacancies,* respondents had

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* This oversimplifies, but not materially. See App. 24 for the details. One petitioner here viced a *Bradley* Democrat from the Department of Mental Health, rather than DOT.

(a) acted with a motive and intent to discriminate against them because they were Republicans, and (b) failed to carry their burden of proving that they would have taken those harsh actions in any event, absent their discriminatory motivation. (App. 37-38)

The principal defense was that fiscal shortages and the *Bradley* writ compelled the layoff. As to the original vicing, respondents correctly pointed out that all DOT employees were then Republicans. Necessarily, anyone laid off was going to be a Republican. Meanwhile, DOT was already laying off some workers for fiscal reasons. Therefore, the Court of Appeals concluded that respondents were innocent. But the District Judge found (and the record shows) that a long series of circumstances having absolutely nothing to do with fiscal exigencies proved the motive for and successful execution of a discriminatory plan to get rid of petitioners, and to *stay* rid of petitioners because they were Republicans. See the details at pages 16-23, below. The Court of Appeals never mentioned these findings or the evidence establishing them.

REASONS FOR GRANTING THE WRIT

The combination of five circumstances make this a case of great general importance:

(a) The First Amendment rights involved.

(b) The clear, specific character of the facts on which the District Judge found the Constitution violated.

(c) The way in which those facts (including any which may be deemed to favor respondents) would lend themselves to a clarification of this Court's crucially important burden of proof, public employment, and political free speech decisions.

(d) The plethora of cases invoking the burden of proof rule in *Mt. Healthy City School District Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 287 (1977) (hereinafter *Mt. Healthy*). See the 156 reported cases listed and categorized at App. 62-72. This suggests the importance of reversing or adopting the Seventh Circuit's anti-*Mt. Healthy* rule which was followed in this case.

(e) The probable impact of the Seventh Circuit's conspicuous misuse of *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) in this case.

1. The employment by the Court of Appeals (App. 17) of the *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) "balancing test" is a major heresy bound to create confusion and do damage in future cases.

Pickering recognized that sometimes a balance must be struck between the right of a public employee to speak and the interest of his employer which that speech invades. But here the Court of Appeals applies that

balancing process to a civil servant's membership in the Republican Party. Since the State has no interest whatever which is invaded by such an association, and thus no right whatever to meddle with it (indeed, that is the gist of this case) it is impossible to understand how *Pickering* can be used against petitioners here. But the Court of Appeals did it, and by implication invited other judges (including *every* judge in the Seventh Circuit) to do the same.

2. For the second time in two years the Seventh Circuit has, in near identical terms, inverted the burden of proof rule of *Mt. Healthy*, 429 U.S. 274, 287 (1977). (App. 16; *McGill* v. *Board of Ed. of Pekin Elementary School Dist.*, 602 F.2d 774, 779 (7th Cir. 1979) (*Nota bene* 779 (n. 8).) The *Mt. Healthy* rule is vital. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

The issue here is thus common and crucial to a multitude of public employment, labor, race discrimination, sex discrimination, free speech, and other kinds of cases. See the 156 *Mt. Healthy* cases at App. 62-72. In this case, the Seventh Circuit has transformed *Mt. Healthy* into something new and strange.

This is the context: On the basis of a small mountain of circumstantial evidence, the District Judge, applying the standards of *Mt. Healthy* (see App. 31-32, 37), held that respondents had violated the First Amendment rights of petitioners defined in *Elrod* v. *Burns*, 427 U.S. 347 (1976). (App. 31, 38) In reversing, the Seventh Circuit cited *Mt. Healthy* and then inverted its rule in deciding the case; the Court went on to reject the District Judge's crucial findings of motive and intent, in a context

which not only disregarded the trial judge's unique advantages as a fact-finder, but which clearly reflected an indifference to the policies underlying *Mt. Healthy's* carefully balanced distribution of burdens. This last speaks not to what the court *said,* but to what it did. (App. 16-17)

The Seventh Circuit change is fundamental: *Mt Healthy* says the plaintiff must show that his constitutionally protected conduct was "*a* 'motivating factor,'" in the defendant's challenged action. 429 U.S. at 287 (emphasis added). But here, the Seventh Circuit, three times in its three dispositive sentences, announces that plaintiff must show his constitutionally protected conduct was "*the*" motivating factor:

> [P]laintiffs' "conduct" was simply their membership in the Republican party, and such political association is clearly constitutionally protected. However, the crucial burden is upon the plaintiffs to show that this conduct was *the* motivating factor in the layoff decision. Here we must determine whether the district court's finding that such conduct was *the* motivating factor is clearly erroneous. We now hold, from a review of the testimony and other evidence before the district court, the finding that plaintiffs have satisfied their burden of proving that political affiliation was *the* motivating factor in their discharge is clearly erroneous. To paraphrase the Supreme Court, plaintiffs have simply failed to carry their burden, and this conclusion must end the constitutional inquiry. (App. 16, emphasis added.)*

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* The opinion's references in the immediately preceding paragraph to *Mt. Healthy* and *Arlington Heights,* both "dual motivation" cases, make the Court's three times repeated insistence on "*the* motivating factor" all the more striking, especially when viewed in light of *McGill* and of respondents' argument, both *infra.*

Respondents invited this result. After citing the *Mt. Healthy* passage in *Givhan* v. *Western Line Consol. School District,* 439 U.S. 410, 416 (1979), respondents wound up their burden of proof argument in the Court of Appeals with this: "*Branti* v. *Finkel,* [455 U.S. 507] dispels any doubt about the necessity of plaintiffs showing here that impermissible political discrimination was the *only* reason for the layoffs." Reply Brief of respondents in the Court of Appeals 12. Repeated at 13. (In order that these assertions may be seen in their full, if bewildering, context, we have reprinted the pages involved at App. 73-74.)

"*The* motivating factor" appears to be settled doctrine in the Seventh Circuit. See *McGill* v. *Board of Ed. of Pekin Elementary School Dist.,* 602 F.2d 774, 779 (7th Cr. 1979) which says the same thing in a similar context. This doctrine is the more remarkable in light of *Illinois State Employees Union, Council 34* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972), where the tone of then Circuit Judge Stevens's burden opinion stands in great contrast to the present Seventh Circuit approach.

Uncorrected, the present case and *McGill* portend a sea change. If their rule is right, this Court ought to announce that momentous change now and preempt the widespread waste and confusion which delay will inevitably cause. *Cf., e.g., Love* v. *Sessions,* 568 F.2d 357 (5th Cir. 1978) (three jury trials of one *Mt. Healthy* case required, the third because of changing burden rules). If the new rule is wrong, this Court ought to say *that,* so Seventh Circuit litigants can receive fair trials and judges across the country can know that this Court's rule is alive and healthy.

3. For all practical purposes, the Seventh Circuit rule eviscerates the substantive constitutional protections involved. By requiring the victim to prove that the defendant's *sole* motive was to violate his rights, the new rule ensures that he will almost always lose; in practice, nobody ever acts with a monolithic sealed motive. The sole motive standard echoes the specific intent requirement imposed in criminal civil rights cases by *Screws* v. *United States,* 325 U.S. 91, 103-105 (1945). It is entirely inappropriate in the present context. Contrast *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961). If a *Screws*-type rule is now to prevail, the sooner the Federal judiciary finds out, the better.

Even *Mt. Healthy* has been criticized as presenting "an extremely high, if not insurmountable, barrier to a victim's challenge. . . ." Note, *Patronage and the First Amendment after Elrod* v. *Burns,* 78 Colum.L.R. 468, 479 (1978). But the barrier presented by the Seventh Circuit is *truly* insurmountable.

4. The Court of Appeals misses the whole First Amendment point of the case as well as most of the evidence. The Court of Appeals reasoned that the *Bradley* writ combined with money shortages necessitated the layoffs of petitioners. Since all the workers in DOT at the time were Republicans, the Court concluded that political retaliation could not possibly be involved. "In the final analysis, that is what this case comes down to, whether the State of Illinois should have employed the *Bradley* plaintiffs without any equivalent reduction in personnel." (App. 18) But that is *not* "what this case comes down to." In thus painting with a broad brush the Court of Appeals simply ignored the massive evidence that respondents had acted to make sure that (1) peti-

tioners would be viced *regardless* whether a job-eligible *Bradley* plaintiff showed up; (2) petitioners would be forestalled from making job-saving transfers or obtaining reinstatements when *Bradley* plaintiffs died or quit. None of these actions by respondents had anything to do with DOT fiscal problems, or defying the *Bradley* writ, or anything else except a desire to see to it that the Republican petitioners were not only *moved* off the job but *kept* off the job. The trier of fact so found.

The Court of Appeals held that all the findings of the District Judge were "clearly erroneous." (App. 16) However, since the primary issues were those of motive and intent, the findings must be upheld if supported by evidence. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949). It is not necessary to penetrate the evidentiary thicket except to see if a rational District Judge could possibly draw from it the conclusions this one did. Here the Court of Appeals applied a succession of wrong legal standards, hostile to this kind of litigation, coupled with a near-total disregard for the evidentiary basis of the District Judge's decision. It also ignored this Court's admonition peculiarly applicable to cases like this:

> [F]acts in a case like the instant one, when seen through the eyes of judges familar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them. . . . That is one reason why we believe that the Court of Appeals, with only the printed page before [it] . . . , erred in reversing the District Court. The judge most famiilar with the context in which [the facts] occurred . . . was obviously the District Judge, since he heard and viewed the testimony and other evidence presented.
>
> *Mayor of the City of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 621 n. 20 (1974).

The District Judge in this case resolved the issues on the basis of this Court's *Mt. Healthy* standard, not the inversion of that standard established in the Seventh Circuit by *McGill* and adopted by the Court of Appeals at respondents' urging in this case.

The defense at trial was that budgetary constraints, not political bias, forced the (permanent) "layoffs," and the other acts directed against petitioners. Based on his view of the witnesses and the complex interaction of all the evidence, the trial judge found that defendants' motives were political, not budgetary. Among many circumstances proved by the evidence, the District Judge based his decision on these (the Court of Appeals mentioned *none* of them):

(a) Respondents' action took place in an intensely political and patronage-oriented environment. (App. 32-35) The lead actor was "[Respondent] Hannigan [who] was in charge of patronage at DOT" (App. 34) and through whom all hiring and firing of civil servants had to be cleared. (CA 4, 11-12, 23A) Shortly before the events in this case, Hannigan had been enjoined by a state court as a result of firing four Republicans and replacing them with patronage Democrats in the Department of Mental Health. (CA 76-80)

(b) On the same day respondent Rhoads laid off 25 petitioners, he authorized the hiring of 32 additional summer laborers in the same district. (CA 33A, 35) Rhoads got his instructions from "downtown." (App. 35) The process of authorizing and filling the 32 new jobs began when Hannigan conferred with "Mr. David Cleverdon, the patronage director in the governor's office . . . ." (App. 34) Rhoads admitted petitioners were qualified to fill the 32 new jobs. But, "[w]hen . . . Rhoads

attempted to get approval for [petitioners] to apply for voluntary reductions [transfers] as authorized under the personnel code, Hannigan told Rhoads that these requests could not be honored." (App. 34) Instead the positions were filled by Cleverdon's people. (CA 33A)

The Court of Appeals dismissed these findings without mentioning them, saying merely that it was "not persuaded" that the 32 jobs were "in the same class" as petitioners. (App. 17 n. 13) In short, the new jobs were "temporary" or "different" or some such, and therefore respondents' exclusion of petitioners from transfers to them could not be a rational basis for a District Judge to infer discriminatory intent and resulting injury. What this really means is that in the Seventh Circuit, as long as labels change, the District Judge may not draw an inference based on all the facts—plaintiff loses, absent a confession by the defendant. And here defendants refused to confess: Rhoads testified that the juxtaposition of firings, hirings, and (by implication) non-transfers was "coincidental . . . absolutely." (CA 33A) The District Judge watched him testify and didn't buy it; that turned out to be "clear error."

(c) ". . . [Petitioners] proved that during the period subsequent to [their] layoff, funding was available for at least five "ghost" employees in the district where [petitioners] were laid off." (App. 37) The ghosts were in fact hired. (CA 105-107) They were employees "who, although they were on the payroll, were very rarely seen and whose function was unknown to those working in the district. The conclusion that they were political patronage workers is inescapable." (App. 37) There had been no ghosts prior to April 1973 (CA 221) which happened to be when the *Bradley* writ issued. (App. 26)

The Court of Appeals said it wasn't "persuaded" that the ghosts were "in the same class" as petitioners, so they didn't count. (App. 17 n. 13) In other words, when respondents spend money on Democratic ghosts in preference to reemploying laid off Republican civil servants the District Judge may not consider that on the issue of motive, intent, and injury. Here, the District Judge might reasonably have concluded what he evidently did conclude: the job "classes" and work descriptions of the ghosts were irrelevant because the ghosts reported to no job and did no work.

(d) "[F]ive of the returning *Bradley* plaintiffs were thought physically incapable of performing their duties . . . ." (App. 33) The DOT medical committee found that they were not capable of performing the duties of their positions. The DOT staff attorney recommended that the Attorney General be contacted for filing a motion with the *Bradley* court to excuse the reinstatement of the five. (CA 42-42C, 616A, 619, 668) The request was taken to patronage assistant Hannigan. Nothing was done. The five men were rehired (CA 42C-D, 43A-B, 83-85) and five petitioners were thereby "viced." When one of the *Bradley* five died four months later (CA 668, A 561-m), no petitioner was called back to replace him.

(e) Apart from the medical examinations, five other *Bradley* plaintiffs did not pass DOT eye tests. (CA 616, 625, 671-5) Respondent Rhoads knew that if a person couldn't pass the eye test, he was not supposed to be employed. (CA 29) The five were employed anyhow. One of them resigned in less than two weeks, but his "vicee," petitioner Casey, was still terminated and not reinstated. (A56j, CA 43D-E, 696D, 700)

(f) One *Bradley* plaintiff never showed up. District 9 therefore requested that petitioner Caldwell not be laid off. (CA 637, 667A) Caldwell was viced the following week, on one day's notice. (A 56v) On September 29, 1973, *Bradley* plaintiff Rowe resigned. (A 56e) Petitioner Potter, who had been viced by Rowe, made a demand for reemployment, but was refused. (*Ibid.*) *Bradley* plaintiff John Davis died October 26, 1973. The corresponding petitioner, Meinders, made a similar demand but was also refused. (CA 43C, A 56k, 1) Hannigan told Rhoads these reinstatements could not be made. (CA 43F-G) Two *Bradley* plaintiffs, Bradley and Hileman, took leaves of absence immediately upon their reinstatement. No petitioner was reemployed for the period of the extended leaves. (CA 45A-C, 467A, 695, A 56e-f)

(g) The Personnel Rules required that layoffs be in seniority order. (CA 560, Rule 2-570) However, in DOT Rhoads decided that if they could find the man who viced the *Bradley* plaintiff in 1969, they did not have to follow the rule of seniority. (CA 27-32, 53-54, 292. 573, 575) Later, when layoffs were rescinded, Rhoads reinstated other employees on a seniority basis. However, petitioners Peeler and Johnson, who were in that same unit and had more seniority, did not get reinstated. (CA 49, A 7-12, 127-8, 181, 466-7) Rhoads admitted at trial there was no justification for what he did. (CA 44, A 11-12)

(h) A crucially important civil service record is the performance report. (CA 559, Rule 2-560) Without valid reports the layoff could not proceed. (CA 259-60) The report indicates its purpose, such as discharge or layoff, or whatever, and provides a space for the employee to sign and comment. (CA 665-6) Petitioners were not given performance reports. Had they been, they would have had some slight notice that they were going to get viced.

(CA 281) (CA 48, 49, A 3-6, 185, 575) Instead, respondents altered performance reports which had been signed by petitioners for a different purpose the previous year and submitted them to the Department of Personnel for layoff action without telling petitioners. (CA 47-49A 1-2, 696A-C) That made the reports "null and void" under the rules (CA 562) but it also kept the vicing secret until the last minute.

(i) DOT had a policy that persons to be laid off would receive two weeks notice. (CA 553, 623-4) Rhoads implemented the policy. (CA 26C, 553) One reason for the policy was to give certified employees the opportunity to request a transfer to a unit where there might be a vacancy. (CA 16-77, 533)

Petitioners were laid off effective June 30 and did not receive their notices until between Friday, June 29 and Monday, July 2, although they had been selected for vicing by June 7. (CA 139, 616, 628) Rhoads knew petitioners wouldn't get notice before June 29. (CA 46B) In the period June 20 to 29, Hannigan was instructing Rhoads to rescind other individual layoffs. (CA 42E, 686A)

Normally, a transfer wasn't granted until an employee requested it. (CA 204) Petitioner Mathis could have been transferred had he requested it. (CA 146-7) However, he did not receive his notice until Friday, June 29. (A 56v) The only way he then could have qualified for transfer was to have the layoff rescinded. (CA 46C-D)

The layoff notice did not inform petitioners of their rights to a voluntary reduction (*i.e.*, transfer to the 32 new jobs) under the Personnel Rules. (CA 370-A-B, 718-721) When petitioner Holmes requested a voluntary re-

duction after receiving his notice, he was told it was denied because he had not made the request before the layoff took effect. (CA 622) Respondent Jones conceded this procedure made the right meaningless. (CA 334-5) Holmes was seeking the position of a yard man who had retired at the same time. (A 205-7, CA 621) Rhoads denied Holmes's requests on Hannigan's instructions after being told by Hannigan that they couldn't give voluntary reductions. (CA 21-3, 622) However, on July 24, Rhoads approved a voluntary reduction of a maintenance employee in Cook County on a form that was dated to be effective the prior July 1. (CA 686) This was typical of transactions granting voluntary reductions at the time. (CA 43, 43A)

(j) In Unit 922, seven laid-off maintenance workers were on a reemployment list. Six were petitioners and one, a Mr. Fitzpatrick, had been chosen for layoff prior to petitioners because of a poor performance report. (CA 194-5, 633A) When a vacancy arose, the one name Hannigan picked off the list for rehire was Fitzpatrick. (CA 43K, 421-3)

(k) During 1973 and 1974, Hannigan would give Rhoads the names of persons to be appointed in maintenance positions. (CA-11-12) Among these appointments from Hannigan's office was that of a Dean West hired as a Maintenance Lead Worker in one of the units in which a petitioner had been laid off. In addition, this unit adjoined the County where petitioner Lovellette had held exactly the same position. (CA 10, 200-1, 687, A 56a, b, g, h, k, l) West had been a Democratic County Sheriff and was then a Democratic Committeeman. (CA 364-5) Petitioners were given no opportunity for reinstatement.

This is only *some* of the relevant evidence of discrimination against petitioners. However, respondents have an explanation for everything. The point in this case is that the trier of fact, in finding motive and intent, did not credit those explanations. That should be that. In any event, he was not only reasonable, he was right.

5. The District Judge's opinion points out the merits, the importance, and the ramifications in the racial discrimination area of the procedural due process issues which ths case raises. *Compare* App. 27 (administrative due process) *with* App. 28-30 (judicial due process).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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